UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MV PUBLIC TRANSPORTATION, INC.		
and	Case Nos.	29-CA-29530 29-CA-29760
JOHN D. RUSSELL, AN INDIVIDUAL		
and	Case No.	29-CA-29544
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO		
and	Case No.	29-CA-29619
ERIC BAUMWOLL, AN INDIVIDUAL		
and		
LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Party to the Contract		
LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
and	Case No.	29-CB-13981
JOHN D. RUSSELL, AN INDIVIDUAL		

ANSWERING BRIEF OF CHARGING PARTY
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO
TO RESPONDENTS' EXCEPTIONS

TABLE OF CONTENTS

Page

Preliminary Statement 1

Argument 2

I. The ALJ correctly held that MVPT violated the Act by recognizing Local 707 when MVPT did not employ a representative segment of its ultimate employee complement and was not yet engaged in its normal business operations. 2

A. Legal Standards 2

B. The ALJ correctly found that MVPT had not yet hired a representative complement of employees at the time of recognition. 3

1. At the time of recognition, MVPT did not employ a representative complement of its projected workforce. 3

2. The ALJ correctly rejected MVPT's claim that the growth in its bargaining unit workforce was unanticipated. 6

3. The ALJ correctly did not credit Rapacioli's testimony suggesting that MVPT's growth was uncertain. 10

C. The ALJ correctly held that MVPT had not yet commenced normal business operations at the time of recognition. 16

II. The ALJ correctly held that Section 10(b) does not bar consideration of whether MVP violated Sections 8(a)(1) and (2) of the Act by prematurely recognizing Local 707. 20

III. The ALJ correctly drew adverse inferences because MVPT failed to produce subpoenaed payroll records and I-9 forms. 33

Conclusion 36

TABLE OF AUTHORITIES

Page(s)

CASES

A.M.A. Leasing, Ltd.,
283 NLRB 1017 (1987) 6

Bannon Mills Inc.,
146 NLRB 611 (1963) 35

Dedicated Services.,
352 NLRB 753 (2008) ..... *passim*

Elmhurst Care Ctr.,
345 NLRB 1176 (2005), enf'd, No. 07-1062,
2008 U.S. App. LEXIS 23355 (D.C. Cir. Nov. 10, 2008) .... *passim*

General Extrusion Co.,
121 NLRB 1165 (1985) 4, 21

Hilton Inn Albany,
270 NLRB 1364 (1984) 2, 6, 16

Klein's Golden Manor,
214 NLRB 807 (1974) 18-19

Local Lodge No. 1424, Int'l Ass'n of Machinists v. NLRB (Bryan Manufacturing),
362 U.S. 411 (1960) 27, 30

NLRB v. Triple C Maintenance, Inc.,
219 F.3d 1147 (10th Cir. 2000) 33

R.J.E. Leasing Corp.,
262 NLRB 373 (1982) 32-33

Regency Grande Nursing and Rehab. Ctr.,
347 NLRB 1143 (2006), enf'd, No. 06-5013, 2008 U.S. App.
LEXIS 3703 (3d Cir. 2008) 27

Standard Dry Wall Prods.,
91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951) .. 11, 31

Texas World Serv. Co. v. NLRB,
928 F.2d 1426 (5th Cir. 1991) 32

United Kiser Servs., LLC,
355 NLRB No. 55, slip op. (2010) 30

PRELIMINARY STATEMENT

Charging Party Local 1181-1061, Amalgamated Transit Union, AFL-CIO ("Charging Party" or "Local 1181") respectfully submits this Answering Brief to the Exceptions to the June 7, 2010 Decision of Administrative Law Judge Michael A. Rosas ("the ALJ") submitted by Respondents MV Public Transportation, Inc. ("the Employer" or "MVPT") and Local 707, International Brotherhood of Teamsters ("Local 707"). For the reasons set forth in the ALJ's thorough and well-reasoned Decision, and for the additional reasons stated herein, Respondents violated the Act as the ALJ concluded and Respondents' Exceptions are without merit.[1]

We address in this brief only MVPT's unlawful recognition of Local 707 and the timeliness defense raised by MVPT and Local 707. Specifically, the ALJ held that MVPT violated the Act by recognizing Local 707 as the exclusive bargaining representative of employees working out of MVPT's Staten Island facility when MVPT did not yet employ a substantial and representative complement of its projected workforce and had not yet commenced normal business operations. MVPT's and Local 707's Exceptions to these findings and conclusions are without merit. The ALJ

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[1]Citations herein to the ALJ's Decision are to "ALJD". Citations to the transcript of proceedings in this case are to "Tr. __". Citations to exhibits are identified by party designation ("Jt.", "GC", "1181", "MVPT", or "707") followed by "Ex. __".

also held that the charges were not untimely. Under established Board precedent, MVPT's and Local 707's Exceptions to this holding are also without merit.

ARGUMENT

I. The ALJ correctly held that MVPT violated the Act by recognizing Local 707 when MVPT did not employ a representative segment of its ultimate employee complement and was not yet engaged in its normal business operations.

A. Legal Standards

The ALJ set forth the correct legal standard in determining that MVPT's recognition of Local 707 was premature and unlawful:

> In determining whether an employer prematurely recognized a labor organization, the Board applies a two-part test: (1) the employer must employ a substantial and representative complement of its projected workforce, that is, the job or job classifications designated for the operation must be substantially filled; and (2) the employer must be engaged in normal business operations.

ALJD p. 13, l. 28-32; see also, e.g., Dedicated Servs., 352 NLRB 753, 762 (2008); Hilton Inn Albany, 270 NLRB 1364, 1365-66 (1984).

The ALJ also recognized the competing interests that the Board balances to determine whether the timing of recognition was appropriate. The Board balances "the right of those employees, already employed, to engage in collective bargaining should they so choose" with the desire "to have that choice made, not by a small, unrepresentative group of employees, but by a group that adequately represents the interests of the

anticipated full complement of the unit employees -- all of whom will be bound, at least initially, by the choice of those who were hired before them." Elmhurst Care Ctr., 345 NLRB 1176, 1176-1177 (2005), enf'd, No. 07-1062, 2008 U.S. App. LEXIS 23355 (D.C. Cir. Nov. 10, 2008); ALJD p. 13, l. 34-38.

B. The ALJ correctly found that MVPT had not yet hired a representative complement of employees at the time of recognition.

1. At the time of recognition, MVPT did not employ a representative complement of its projected workforce.

On September 12, 2008, MVPT recognized Local 707 as the representative of its employees based on 20 cards signed by driver-trainees. At the time, MVPT employed 22 driver-trainees and no regular drivers, mechanics, or utility workers. See ALJD p. 8, l. 24 - p. 9, l. 8, p. 14, l. 26-31; GC Ex. 31. Comparing the complement of 22 employees when MVPT recognized Local 707 with the number of employees during subsequent periods, the ALJ correctly concluded that MVPT did not employ a representative complement of its projected workforce at the time of recognition. See ALJD p. 14, l. 26-35.[2]

[2]The ALJ erred by failing to find that MVPT employed employees in less than 50 percent of its job classifications at the time of recognition. Such a finding would suffice to establish that the recognition was unlawful and obviate the need to compare the number of employees at the time of recognition and a later date. Local 1181 today filed Cross-Exceptions relating to this error and a Brief in Support of its Cross-Exceptions.

In determining whether MVPT employed a representative complement, the ALJ looked to the 30 percent threshold set forth in General Extrusion Co., 121 NLRB 1165 (1985), as a guideline the Board relied on in similar cases. See ALJD p. 14, l. 9-24 (citing Dedicated Services and Hilton Inn Albany). The ALJ also identified two reasonable benchmarks against which to measure the complement at the time of recognition: the complement at the time of the hearing and the projected complement when MVPT would reach 150 vehicles (the number of vehicles MVPT is to operate pursuant to its contract with the New York City Transit Authority ("NYCTA"), subject to expansion to 300 vehicles).[3] See ALJD p. 5, l. 20-22, p. 14, l. 26-35 & nn.61-62. Although MVPT grew and projected growth after these benchmark dates, they are consistent with the Board's concern in balancing competing interests.

The ALJ found that MVPT employed 280 employees as of the date of the hearing and that MVPT projected employing 267 drivers for 150 vehicles. See ALJD p. 14, l. 26-35.[4]

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[3]The ALJ referenced MVPT reaching 150 vehicles by September 2009 and within ten months. Any inconsistency is not material because the ALJ's emphasis for this alternative benchmark was the projected size of the workforce when MVPT reached 150 vehicles. The date when that occurred is not significant. See ALJD p. 13, l. 44-45, p. 14, l. 32-35 & nn.61-62.

[4]Elsewhere, the ALJ found that, by the time of the hearing, MVPT had 280 drivers and 29 mechanics on the payroll. See ALJD p. 7, l. 26-32.

Thus, the ALJ found that, at the time of recognition, MVPT employed a mere 7.9 percent of the 280 employees MVPT employed at the time of the hearing. Similarly, the ALJ found that MVPT employed only 8.2 percent of the 267 drivers MVPT projected employing when it reached 150 vehicles. See ALJD p. 14, l. 29-33. Both calculations show that MVPT employed far less than the 30 percent threshold when it recognized Local 707.

The ALJ also found that there is high turnover among drivers and that many driver-trainees do not complete the training. See ALJD p. 6, l. 12-13; Tr. 456-57. MVPT's training and hiring practices are predicated on the understanding that, in every class, some trainees will not complete training. See Tr. 401, 456-57. For example, only six of the driver-trainees hired before September 12, 2008, were still employees on December 12, 2008. See ALJD p. 7, l. 20-22. Taking into consideration the Board's balancing of interests, such turnover further shows that MVPT's driver-trainees employed on September 12, 2008 were not a representative complement and should not have been allowed to choose the unit's bargaining representative. See Elmhurst Care Ctr., 345 NLRB at 1184 (ALJ found no representative complement when, at the time of recognition, the employer employed about 40 percent of the total employed at the time of the hearing, but only 25 percent of

those who signed cards were still employed, representing only 10 percent of current employees).

MVPT and Local 707 do not dispute that at the time of recognition MVPT employed only 22 employees or that MVPT's workforce grew continuously thereafter. MVPT and Local 707 also do not except to the ALJ's calculations. Accordingly, MVPT recognized Local 707 when MVPT did not yet employ a representative complement of its ultimate workforce.

2. The ALJ correctly rejected MVPT's claim that the growth in its bargaining unit workforce was unanticipated.

The ALJ correctly rejected MVPT's assertion that it was uncertain on September 12, 2008 that its workforce would grow. See ALJD p. 14, l. 36 - p. 15, l. 4.

In determining whether an employer recognized a union when a representative complement of employees was present, the Board need not accept an employer's self-serving assertions that it did not "know" reasonably anticipated growth would come to pass. See Hilton Inn Albany, 270 NLRB at 1365-66 (rejecting employer's claimed projections and finding that the employer contemplated greatly expanding its workforce in the immediate future, thus leading to the Board's conclusion that the employer did not employ a representative complement at the time of recognition); A.M.A. Leasing, Ltd., 283 NLRB 1017, 1024 (1987) (rejecting employer's witness' "self-serving and uncorroborated testimony"

that he expected to employ only 20 to 30 people because the employer's agreement with its client anticipated that the workforce would grow beyond 40 employees and the employer employed 46 people less than two months after recognition).

Here, overwhelming record evidence, including MVPT documents and, perhaps most significantly, MVPT's actions, demonstrates that MVPT expected and prepared for the growth of its workforce.

After only one day of operations on October 1, 2008, MVPT inquired of NYCTA when to expect more vehicles because MVPT had classes of drivers "coming out" October 6 and 13, 2008. See GC Ex. 26.[5]

The number of driver-trainees (i.e., potential new regular drivers) on MVPT's payroll shows that MVPT continuously anticipated substantial growth of its operations and workforce. MVPT's records reflect dozens of driver-trainees on each two-week payroll between October and December 2008. See GC Ex. 31.

MVPT even trumpeted its forthcoming growth. As the ALJ noted, MVPT's press release announcing its $422 million contract states that "[t]he initial contract award includes a doubling of

[5]We attach a copy of this correspondence (GC Ex. 26) to this brief for the Board's convenience.

the vehicles used to provide service - from 150 to 300". See ALJD p. 6, l. 17 - p. 7, l. 10; GC Ex. 23.[6]

The ALJ specifically relied on MVPT's $422 million contract with NYCTA, which contemplates MVPT's operation of an initial 150 vehicles and expansion to 300 vehicles. See ALJD p. 14, l. 37 - p. 15, l. 4; Attachment 2 to GC Ex. 20. Attachment 30 to the contract sets forth an "Initial Startup" and "Expansion Schedule". During the initial startup, MVPT was to "field" fifteen vehicles within 45 days from the Notice of Award, twenty additional vehicles per month for the following three months, and ten additional vehicles per month thereafter until MVPT was assigned 150 vehicles. Under the expansion schedule, MVPT would add ten vehicles per month after it is assigned 150 vehicles until MVPT is assigned 300 vehicles. See ALJD p. 5, l. 23-30, p. 14, l. 37 - p. 15, l. 4; Attachment 30 to GC Ex. 20.[7]

MVPT received vehicles from NYCTA at about the pace set forth in Attachment 30 or faster, most importantly through the first deadlines of the initial startup and the period when MVPT feigns uncertainty as to its growth prospects. See ALJD p. 7 n.33; GC Ex. 24.

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[6]We attach a copy of MVPT's press release (GC Ex. 23) to this brief for the Board's convenience.

[7]We attach a copy of Attachment 30 to MVPT's contract with NYCTA (GC Ex. 20) to this brief for the Board's convenience.

In September 2008, Rapacioli prepared a projected "ramp up" schedule, titled "contract requirement", which set forth, on a weekly basis through August 2009, among other things, the number of buses MVPT would be assigned, the number of buses in service, the number of routes, and the number of employees in various classifications. See ALJD p. 5, l. 34 - p. 6, l. 2; GC Ex. 28; Tr. 344-48. In the schedule, Rapacioli projected a workforce including 10 drivers on October 1, 2008, approximately tripling to 29 drivers by October 20, 2008, reaching 109 drivers by December 22, 2008, and continuing to grow substantially thereafter. See ALJD p. 5, l. 34 - p. 6, l. 2; GC Ex. 28.

MVPT, in its brief in support of its Exceptions, concedes that Rapacioli's projected ramp up schedule "represented a guarantee by [MVPT] that it could service that number of routes", although MVPT maintains that the schedule does not represent "a guarantee that those routes would be assigned by the Transit Authority." MVPT Br. at 4. MVPT's "guarantee" shows that MVPT intended to hire employees to perform the routes and necessary support staff as set forth in the schedule.

On September 12, 2008, the date MVPT recognized Local 707, in connection with a change in the location of MVPT's facility, MVPT offered to NYCTA to maintain its "ramp up commitment" while the new site was being completed. By letter dated September 22, 2008, NYCTA approved the new site contingent on, among other

things, MVPT maintaining its "ramp up commitment". See ALJD p. 5, l. 32-34; GC Ex. 27.[8]

If MVPT had not hired employees to meet the contract schedule, MVPT would have been subject to penalties under its contract of $500 per route per day each time MVPT was assigned a vehicle and a route and MVPT did not have a driver to perform an assigned route. See Tr. 401; see also GC Ex. 20, "Specific Contract Provisions", Articles 104(B)(4), 106(A)(2).

Last, there is no evidence that MVPT took a single action to restrain its own investment in training new employees or any other asset because of any concern that its future growth was uncertain.

Thus, MVPT's contract with NYCTA, Rapacioli's own projections, and substantial other evidence compel the conclusion that MVPT knew that it would employ a much larger number of employees than the 22 driver-trainees employed when MVPT recognized Local 707.

3. The ALJ correctly did not credit Rapacioli's testimony suggesting that MVPT's growth was uncertain.

MVPT and Local 707 argue that the ALJ erred in not crediting Rapacioli's purported testimony that MVPT's growth was "unanticipated". See MVPT Br. at 7; 707 Br. at 8-9.

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[8]We attach a copy of the September 22, 2008 letter (GC Ex. 27) to this brief for the Board's convenience.

The Board's policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates that they are incorrect. See Standard Dry Wall Prods., 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951).

Here, the ALJ's rejection of Rapacioli's claims of uncertainty is well supported by the evidence described above that shows that MVPT expected that it would expand its operations and grow its workforce consistent with MVPT's $422 million contract with the NYCTA and the ramp-up schedule that Rapacioli prepared, but in any case far beyond the 22 driver-trainees employed when MVPT recognized Local 707. See ALJD p. 7, l. 12-13 & n.33.

MVPT and Local 707 do not cite in their briefs to any testimony by Rapacioli where he states that MVPT did not anticipate growth when it recognized Local 707, but only that MVPT's growth was not guaranteed.[9]

MVPT's effort to inject "uncertainty" rests on a purported concern that RJR Paratransit Corp. ("RJR"), the incumbent paratransit company doing business from Staten Island, would

[9]For example, MVPT cites to page 398 of the transcript to support its assertions that Rapacioli testified that he was unaware at the time of recognition of the number of routes or vehicles that would be assigned to MVPT. See MVPT Br. at 7. The only pertinent testimony on that page is Rapacioli's assertion that he did not know "for certain" that RJR's contract would not be renewed until December 2008.

secure an extension of its contract or a new contract. According to MVPT and Rapacioli, that would have limited MVPT's growth. See Tr. 411; MVPT Br. at 7-8.

RJR bid in response to the same RFP as MVPT and other companies. See Tr. 397, 452. RJR was not awarded a new contract or contract extension. See Tr. 396. RJR's last day of business was December 31, 2008. See Tr. 453.

No record evidence (other than Rapacioli's self-serving statements[10]) supports Rapacioli's purported concern about RJR. For example, there is no record evidence that NYCTA considered extending RJR's contract or giving RJR a new contract. Rapacioli's testimony about RJR's efforts to get a contract extension based on hearsay were admitted solely for "background". See Tr. 397-98; see also ALJD p. 15, l. 2-4.

MVPT asserts that it did not know "for certain" until December 2008 that NYCTA would not renew RJR's contract. See Tr. 398. However, MVPT omits to mention all that Rapacioli knew before December 2008, which shows that MVPT was aware that RJR was no genuine threat. As Rapacioli said, "it's a small business, so we talk." See Tr. 397. Rapacioli stated that he was never told "officially" that RJR was not awarded a contract,

[10]See Tr. 461 (Rapacioli) ("I did not know that [RJR] did not have a contract, specifically. There was a rumor that [RJR] had no contract and [RJR] was trying to get one.") (emphasis supplied).

see Tr. 460, suggesting that he was told "unofficially". In September 2008, Rapacioli was aware at the least that RJR had a problem with its contract. See Tr. 397. At the end of October 2008, Rapacioli knew that RJR gave its employees notice of layoff at the end of December because NYCTA did not renew RJR's contract. See MV Ex. 5. By letter dated August 29, 2008, NYCTA informed MVPT that some incumbent carriers were not receiving an award at that time and that NYCTA would be relying on the services of companies that were "ramping down" while MVPT was mobilizing and "ramping up". See ALJD p. 4, l. 44 - p. 5, l. 14.

MVPT's assertion that it anticipated operating 20 to 30 routes, see MVPT Br. at 9, is without basis in the record. MVPT's assertion appears to be based on Rapacioli's testimony that MVPT would now only have 20 or 30 vehicles if RJR secured a contract extension. See Tr. 411. But that testimony was purely self-serving and speculative. There is no evidence that Rapacioli believed this at the time of recognition. Indeed, by the end of November 2008, before MVPT began receiving RJR vehicles and while RJR was still operating (see Tr. 398, 450, 461-62), MVPT already had 40 vehicles, almost exactly the number of vehicles MVPT was to have at that time pursuant to the start-up schedule set forth in Attachment 30 to MVPT's contract with the NYCTA. See ALJD p. 7, l. 34-40 & n.33. Each vehicle can

support more than one route, more than one driver, and mechanics and utility workers. See ALJD p. 7, l. 34-36; GC Ex. 28.

During the two week period ending November 28, 2008 (the December 5, 2008 payroll[11]), and, therefore, even before the growth of MVPT's operations that Rapacioli testified occurred in December 2008, MVPT already employed 133 drivers. See ALJD p. 7, l. 19-20; GC Ex. 31; Tr. 398, 400, 461-62.

In any case, if RJR secured an extension or a new contract, there is no basis to conclude that RJR would operate with the same number of vehicles as it did before NYCTA awarded a contract to MVPT. RJR was one of many paratransit companies operating in New York City. See Tr. 397, 402. NYCTA can assign these companies work in any borough regardless of where the company is based. See Tr. 452. MVPT provides services off of Staten Island. See Tr. 394. Thus, even if RJR had received a contract renewal, NYCTA could have assigned some, most, or all of RJR's work to MVPT or another company. NYCTA could also expand or diminish services on Staten Island.

In short, even if one credited that Rapacioli did not know the status of RJR's contract for certain until December 2008, this does not negate the plethora of evidence establishing that

[11]The "payroll records" in evidence as General Counsel's Exhibit 31 indicate the check date. Each check covers a two-week pay period ending the Friday before the check was issued. See Tr. 356.

MVPT grew rapidly after recognizing Local 707 and conformed to its own ramp-up schedule, and expected both to occur, notwithstanding RJR's status.

In any case, if MVPT had any genuine uncertainty about the growth of its workforce when MVPT recognized Local 707, MVPT's status was little different from that of any employer who is not assured of a monopoly. That MVPT may have perceived that it had a competitor or that its client (NYCTA) might decide not to assign more work to MVPT describes most employers' situation. Few employers are guaranteed growth. To conclude that MVPT acted appropriately when it recognized Local 707 because MVPT was not guaranteed growth would practically eliminate representative complement analysis, upsetting the Board's balancing of the rights of those few employees already hired with those of the many more employees who may be hired in the future.

Based on the above, there is no basis to overturn the ALJ's determination to discredit Rapacioli's testimony. The ALJ correctly found that the record evidence demonstrated that MVPT knew in September 2008 that it would grow substantially.

Based on the ALJ's analysis of all of the record evidence, the ALJ correctly held that MVPT did not employ a representative complement of employees when MVPT recognized Local 707.

C. The ALJ correctly held that MVPT had not yet commenced normal business operations at the time of recognition.

The ALJ also correctly held that MVPT was not engaged in normal business operations on September 12, 2008 when MVPT recognized Local 707. See ALJD pp. 15-16.

Under Board law, an employer is not engaged in normal business operations if it is merely preparing for operations and training employees. Thus, in Dedicated Services, a paratransit company (like MVPT) was not engaged in normal business operations when, on the day of recognition, no unit employees had performed any work and training had not commenced. The employer was still not engaged in normal business operations when drivers were engaged in the training NYCTA requires for all access-a-ride drivers and the employer had not hired any maintenance employees. Normal business operations commenced when the employer began servicing clients. See Dedicated Servs., 352 NLRB at 762; see also Elmhurst Care Ctr., 345 NLRB at 1178 (nursing home was not engaged in normal business operations when it was not yet caring for patients but only preparing to open and training employees); Hilton Inn Albany, 270 NLRB at 1366 (hotel was not engaged in normal business operations when it was closed to the public and only in the early stages of preparing to serve the public).

MVPT did not begin normal business operations until October 1, 2008, when MVPT began serving the public by providing access-a-ride paratransit services to elderly and disabled passengers. See ALJD p. 6, l. 17-18, p. 16, l. 10-11. Prior to that time, no employees were engaged in MVPT's work - transporting passengers. Even as of October 1, 2008, MVPT had hired at most two mechanics and no utility workers. See GC Ex. 31.

Because MVPT recognized Local 707 on September 12, 2008, almost three weeks before MVPT commenced normal business operations, MVPT's recognition of Local 707 was premature and violated the Act.

MVPT asserts that "at the time of recognition, [MVPT] was engaged in full scale training and preparation, which involved driving the same vehicles in the same locations as when routes began to be assigned." MVPT Br. at 9. MVPT's fact assertion is directly contrary to the ALJ's finding that, as of September 12, 2008, MVPT's employees were all participating in classroom training. See ALJD p. 6, l. 6-11, p. 16, l. 11-14. Yet MVPT does not provide a single citation to record evidence to support its assertion or to show that the ALJ's finding was incorrect.

Based on its unsupported fact assertion, MVPT contends that "[b]y employing bargaining unit employees, training them to service their customers, and allowing them to drive their vehicles, there is no dispute that [MVPT] was engaged in its

normal business operations."[12] MVPT Br. at 9. Even if employees were receiving on-road training, training employees and preparing for a business opening do not constitute normal business operations. See Dedicated Servs., 352 NLRB at 762; Elmhurst Care Ctr., 345 NLRB at 1178 ("[t]raining and setting up shop . . . in preparation for [performing the business of the employer] is simply not normal operations. . . . Training may be essential to the operation of [the] business, but it is not the business itself."). Transporting elderly and disabled passengers, ensuring passenger safety, and collecting fares (see GC Ex. 20, Attachment 1, Section II(B)(5)), among other duties performed by drivers operating vehicles in revenue service, are substantively different work from merely driving or being trained to service customers. Indeed, MVPT pays driver-trainees $2 per hour less than regular drivers. See GC Ex. 31 (driver-trainees paid $9 per hour; regular drivers paid $11 per hour).

MVPT cites Klein's Golden Manor, 214 NLRB 807 (1974), and the dissent in Elmhurst Care Center in support of its position. See MVPT Br. at 9. The ALJ stated that, "[u]nder a different set of facts, the Company's reliance on Klein's Golden Manor *might* have merit." ALJD p. 15, l. 46-47 (emphasis supplied).

[12]In support of its Exception pertinent to the subject of whether MVPT was engaged in normal business operations at the time of recognition, Local 707's brief mimics this MVPT contention. Local 707 offered no citation to record evidence or authority to support its Exception. See Local 707 Br. at 9-10.

But the ALJ found MVPT's position without merit because "the training involved at the Company's facility on September 12 was *not* the same type of work that employees would perform after operations commenced on or around October 1." ALJD p. 16, l. 8-10. When MVPT recognized Local 707, the only employees, driver-trainees, were still in classroom training. See ALJD p. 16, l. 11-14. The ALJ found this distinction particularly important because half of the trainees at the time of recognition did not complete training. See ALJD p. 16, l. 14-16.

While fact distinctions render futile MVPT's reliance on Klein's Golden Manor and the dissent in Elmhurst Care Center, we respectfully submit that such reliance is also precluded as a matter of law by the majority's holding in Elmhurst Care Center that the employer was not engaged in normal business operations before it commenced providing services to customers.[13]

For these reasons, the ALJ correctly held that MVPT was not engaged in normal business operations at the time of recognition

[13]We are not unmindful of Chairman (then Member) Liebman's dissent in Elmhurst Care Center. But no party here proposes that Board law be modified or overruled. Moreover, the dissent repeatedly identified as significant that 100 percent of the bargaining unit classifications were in place at the time of recognition. See Elmhurst Care Ctr., 345 NLRB at 1179, 1181. Here, as noted in our Cross-Exceptions, filed today, at the time of recognition, MVPT employed only driver-trainees and no regular drivers, mechanics, or utility workers (the three bargaining unit classifications). See supra p. 3.

and, therefore, MVPT's recognition of Local 707 was premature and violated the Act.

II. The ALJ correctly held that Section 10(b) does not bar consideration of whether MVPT violated Sections 8(a)(1) and (2) of the Act by prematurely recognizing Local 707.

The ALJ correctly held that Charging Party Russell's unlawful recognition and assistance charges were timely. See ALJD p. 16, l. 25 - p. 19, l. 27.

The ALJ correctly set forth the principles governing application of Section 10(b). In particular, the ALJ stated that the party raising Section 10(b) as a defense has the burden of proving that the complaint is time-barred. See ALJD p. 17, l. 16-18 (citing Broadway Volkswagen, 342 NLRB 1244, 1246 (2004)); see also Dedicated Servs., 352 NLRB at 759. The ALJ also stated that the Section 10(b) period does not begin to run until the charging party has "clear and unequivocal notice" of a violation of the Act - a well-established principle that MVPT and Local 707 refuse to acknowledge. See ALJD p. 17, l. 6-9 (citing St. Barnabas Med. Ctr., 343 NLRB 1125, 1126 (2004)); see also Dedicated Servs., 352 NLRB at 759.

The ALJ identified alternate accrual dates and rationales in concluding that the charge was not time-barred.[14] First, the

[14]The ALJ misstates Local 1181's position as relying on tolling. See ALJD p. 16, l. 40-44. While Local 1181 argued that the Section 10(b) period should be tolled because of the contents of the Dana notice, Local 1181 also argued positions

ALJ identified October 20, 2008, Russell's first day of work for MVPT and the date Russell obtained notice that MVPT recognized Local 707, see ALJD p. 11, l. 21, p. 19, l. 17-22, and around the date that, according to the ALJ, MVPT's payroll first included a representative segment of its ultimate complement under General Extrusion, see ALJD p. 19, l. 14-17.

In the alternative, the ALJ identified as an appropriate accrual date October 5, 2008, the date the ALJ found that MVPT posted the Dana notice and employees learned that MVPT recognized Local 707. See ALJD p. 19, l. 22-23.

Applying either date, Russell's charges, which were filed on March 31, 2009 and served on April 2, 2009, were not barred by Section 10(b).

The date Russell received notice that MVPT recognized Local 707 (October 20, 2008). The ALJ's identification of October 20, 2008 as the accrual date is well supported by the reasoning of ALJ Fish in Dedicated Services, which the Board affirmed. See Dedicated Servs., 352 NLRB at 753.[15]

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consistent with those advanced by Counsel for the General Counsel ("General Counsel") as set forth by the ALJ, see ALJD p. 16, l. 35-40, except Local 1181 did not argue that the Section 10(b) period commences when employees other than John Russell received clear and unequivocal notice of a violation.

[15]The ALJ stated that Dedicated Services provides guidance but incorrectly stated that the Board "sidestepped" the analysis of alternative accrual theories by Judge Fish in that case. See ALJD p. 18, l. 32-33. Nowhere in Dedicated Services does the

In Dedicated Services, on February 5, 2007, Dedicated Services, Inc. ("Dedicated"), a paratransit company awarded a contract by the NYCTA, recognized Local 713, IBOTU, IUJAT, as its employees' bargaining representative even though Dedicated employed no employees. See 352 NLRB at 761. On February 12, 2007, Dedicated commenced training its first ten drivers. See id. at 756. After February 12, 2007, Dedicated's complement of employees increased each week. On December 2, 2007, Dedicated employed 102 unit employees. See id. at 762.

On August 13, 2007, Local 1181 filed a charge alleging, among other things, that Dedicated violated the Act by recognizing Local 713. See id. at 754.

Dedicated argued that Local 1181's charge was not filed within the Section 10(b) period because Dedicated's employees knew on or before February 5, 2007 that Local 713 was Dedicated's employees' representative and, therefore, Dedicated contended, Local 1181 had constructive knowledge of the recognition of Local 713. See id. at 759.

The Board rejected Dedicated's Section 10(b) defense, finding, among other things, that Local 1181 did not have notice of the recognition outside the 10(b) period and that individual

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Board indicate that it was not relying on Judge Fish's Section 10(b) analysis. The ALJ may have been confused by the Board's statement in Dedicated Services that it found it unnecessary to consider Judge Fish's view of the operative date for an accretion analysis. See Dedicated Servs., 352 NLRB at 753 n.2.

employees' knowledge that Dedicated recognized Local 713 could not be attributed to Local 1181 or bar Local 1181's charge where the information some employees knew more than six months before Local 1181 filed its charge was not known to Local 1181 outside the Section 10(b) period. See id. at 759-60.

Applying the principles stated in Dedicated Services, the challenge to MVPT's recognition of Local 707 is also timely. As in Dedicated Services, the employer (MVPT), a paratransit company awarded a contract by the NYCTA, violated the Act by recognizing a union (Local 707) when the employer did not yet employ a representative complement of its projected workforce. Also as in Dedicated Services, a charging party (Russell) did not receive clear and unequivocal notice of the employer's unlawful recognition of a union until dates within the Section 10(b) period. Even if other employees knew that MVPT recognized Local 707 more than six months before Russell's charge was filed and served, those employees' knowledge can not be attributed or imputed to Russell. Thus, the Section 10(b) period for Russell did not begin to run until, at the earliest, October 20, 2008, when Russell learned that MVPT recognized Local 707.[16]

[16]Because Russell filed his charges within six months of his first day of employment and other employees' knowledge of MVPT's recognition of Local 707 can not be attributed to Russell prior to that date, the testimony concerning when notices pertaining to the recognition were allegedly posted proves irrelevant.

The time MVPT employed a representative complement (October 20, 2008). The ALJ also identified October 20, 2008 as the accrual date because employees would not have had clear and unequivocal notice that MVPT's recognition of Local 707 was premature and unlawful. "[W]hile [MVPT] knew the extent to which it would hire, there is no proof that employees had similar knowledge as of September 12." ALJD p. 19, l. 6-7; see also Dedicated Servs., 352 NLRB at 759 n.21 (knowledge on certain employees' part that an employer recognized a union may not have constituted clear and unequivocal notice of a violation of the Act because the employees may have believed that the recognition was lawful).

In selecting an appropriate accrual date, the ALJ "balanc[ed] the interests of employees seeking to organize and the proscription against representation based upon union recognition by an unrepresentative minority" and concluded that an appropriate accrual date would be "the date when [MVPT] hired a representative segment of the ultimate complement". ALJD p. 19, l. 11-14. The ALJ then determined that a representative complement did not exist until late October, around the time when Russell was hired. See ALJD p. 19, l. 14-19.

In addition to identifying a date by which employees may have known that the recognition was unlawful, the ALJ's balancing of interests gives due consideration to the Board's

interest in stable bargaining relationships. MVPT argues that the ALJ's holding permits newly-hired employees to upset established bargaining relationships. See MVPT Br. at 15. Here, the right of a representative complement of employees to choose their union trumps that interest because the only competing interest would be in a legitimate bargaining relationship. No such interest existed here. Until MVPT employed the requisite complement of its projected workforce, there was no bargaining relationship to be lawfully entered and the Board's interest is in preserving employees' right to choose. Thus, the Section 10(b) period should not be deemed to have commenced until at least on or about October 20, 2008 and there is no valid reason why Russell was not entitled to the full six months from his hire date to file his charges.[17]

[17]MVPT presents an extreme example of a new employee challenging recognition "years or even decades" after a bargaining relationship was established. See MVPT Br. at 15. This case is closer to the opposite concern - circumstances where an employer unlawfully recognizes a union before the employer hires employees or before employees are positioned to discover the unlawful recognition. MVPT's and Local 707's position that an unlawful recognition must be challenged within six months of its occurrence could leave employees little or no opportunity to challenge a premature recognition. In another case where a charging party discovers a violation of the Act after an employer has hired a representative complement of employees and is engaged in normal business operations, the Board may consider re-balancing the competing interests. We respectfully submit that is for another case.

In sum, the principles described and applied in Dedicated Services govern. Under those principles, Russell's charges are not barred by Section 10(b).

The date MVPT allegedly posted the Dana notice (October 5, 2008). The ALJ found that "an appropriate earlier accrual date would be on or after October 5, when employees learned of Local 707's representative status." ALJD p. 19, l. 22-23. Using this accrual date, Russell's charges would still be timely. See ALJD p. 19, l. 25-26.

The ALJ selected this date because the ALJ found that MVPT posted the Dana notice on this date. See ALJD p. 10, l. 12, p. 16, l. 50-51. As a fact matter, the ALJ did not explain why he found that other notices, if posted in the drivers' room, would not have been reasonably observable but the Dana notice posted in the same location would have been. See ALJD p. 17, l. 25-27. Moreover, the ALJ did not find that employees would have notice on October 5, 2008 that the recognition was unlawful. See ALJD p. 19, l. 5-7, 21-23. Indeed, for reasons discussed herein, the posting of the Dana notice warrants a later accrual date.

As a matter of law, applying Dedicated Services, the Section 10(b) period could not begin to run on October 5, 2008 because Russell had no knowledge of a violation at that time.

Thus, we respectfully disagree with the ALJ's conclusion that October 5, 2008 is an appropriate date to commence the

Section 10(b) period. See Local 1181's Exceptions and brief in support, filed today. However, as noted, if this date is utilized, Russell's charges are timely.

Later accrual dates and tolling theory. Even October 20, 2008 may be too early an accrual date because the fact that Russell learned on that date that MVPT recognized Local 707 does not mean that Russell received clear and unequivocal notice that the recognition was unlawful. This is especially true because, by allegedly posting the Dana notice, MVPT utilized the Board's procedures in a way that would have misled employees to understand that MVPT's recognition of Local 707 was lawful and even had the NLRB's "blessing".

Alternatively, the Section 10(b) period should be tolled because of the misleading effect of the Dana notice.[18]

Whether the Board finds that the Section 10(b) period did not accrue because employees did not receive clear and unequivocal notice of a violation or that the Section 10(b)

[18]Contrary to the ALJ's statement, Local Lodge No. 1424, Int'l Ass'n of Machinists v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960), does not preclude a finding that the Section 10(b) period should be tolled. See ALJD p. 17, l. 34-39. Equitable tolling and continuing violations are different concepts. While Bryan Manufacturing largely bars reliance upon the latter, the Board continues to toll the Section 10(b) period in appropriate circumstances. See, e.g., Regency Grande Nursing and Rehab. Ctr., 347 NLRB 1143, 1144 (2006), enf'd, No. 06-5013, 2008 U.S. App. LEXIS 3703 (3d Cir. 2008).

period should be tolled, the potential impact of the alleged posting of the Dana notice should not be overlooked.

The text of the Dana notice, an official government notice, suggests that recognition was proper because MVPT recognized Local 707 "based on evidence indicating that a majority of employees in [a] bargaining unit desire [Local 707's] representation". MVPT Ex. 8. The Dana notice does not include any indication that recognition may have been unlawful. The only option for employees who wish to challenge the recognition set forth in the Dana notice is to file a Petition. No information is contained therein about filing an unfair labor practice charge. Moreover, the Dana notice suggests that a charge could not be filed more than 45 days after the date the notice was posted. See id. ("If no petition is filed within 45 days from the date of the posting of the notice, then the Union's [*i.e.*, Local 707's] status as the unit employees' exclusive bargaining representative will not be subject to challenge for a reasonable period of time . . .") (emphasis supplied).

For these reasons, notice of recognition in the circumstances of this case would not constitute clear and unequivocal notice to employees of a violation of the Act sufficient to start the Section 10(b) period. See Dedicated Servs., 352 NLRB at 759 n.21.

Alternatively, the charges should be found timely because MVPT's actions warrant tolling of the Section 10(b) period. The false impressions the Dana notice conveyed extended at least for the period the notice was allegedly posted (MVPT and Local 707 allege from October 5, 2008 to November 20, 2008) and continued thereafter because there was no Board remedy. See MVPT Ex. 7. Thus, the limitations period should be tolled at least from October 5, 2008 to November 20, 2008.

MVPT's and Local 707's Remaining Arguments Concerning Section 10(b). In addition to the arguments set forth above, MVPT and Local 707 maintain that the ALJ erred by failing to find that the charges are time-barred because: (1) Section 10(b) requires that the limitations period begin to run on the date of the alleged unlawful recognition, September 12, 2008, see MVPT Br. at 10-11; Local 707 Br. at 5; and (2) the Section 10(b) period began to run in September 2008 when MVPT and Local 707 allege that they notified employees that MVPT recognized Local 707, see MVPT Br. at 11-14; Local 707 Br. at 4-6.

MVPT's and Local 707's first argument is simply irreconcilable with established Board law. As set forth above, the law is clear that the Section 10(b) period does not begin to run until a party has "clear and unequivocal notice" of a violation. See supra p. 20.

MVPT and Local 707 erroneously rely on Bryan Manufacturing. See MVPT Br. at 11, 14-15; 707 Br. at 6. Bryan Manufacturing rejected the assertion that enforcement of an allegedly unlawful collective bargaining agreement executed outside the Section 10(b) period constitutes a continuing violation. See ALJD p. 17, l. 36-38. However, General Counsel does not rely upon a continuing violation theory in this case; the issue is notice of a violation to the Charging Party. As the Board recently noted, "Bryan Mfg. . . . did not alter the Board's well-established law that the 10(b) period begins to run only after the aggrieved party receives actual or constructive notice of a violation of the Act." United Kiser Servs., LLC, 355 NLRB No. 55, slip op. at 2 n.5 (2010).

MVPT's and Local 707's second argument is without merit for several reasons.

MVPT's and Local 707's assertion that they notified employees in September 2008 that MVPT voluntarily recognized Local 707 is effectively barred by the ALJ's finding directly to the contrary based on credibility resolutions. See ALJD p. 9, l. 12-14, p. 17, l. 21-27. The ALJ set forth in detail specific reasons for his credibility resolutions on this issue. See ALJD p. 9 n.40. The ALJ's consideration of witness credibility on this issue was thorough and objectively reasoned. See ALJD p. 9 n.40. In addition, we note that MVPT's witnesses are all

managers. MVPT did not call as a witness any present or former bargaining unit employee who is not now a manager.

MVPT incorrectly asserts that the ALJ was biased and discredited MVPT witnesses in their entirety. See MVPT Br. at 2, 9, 13. For example, the ALJ credited Rapacioli over the General Counsel's witnesses on a key contested fact: the ALJ found that Rapacioli posted the Dana notice on October 5, 2008. See ALJD p. 10, l. 11-12 & n.46.

Also contrary to MVPT's exceptions, see MVPT Br. at 9, the ALJ did not discredit Rapacioli's testimony based solely on Rapacioli's disavowal of the accuracy of the payroll information. See, e.g., ALJD p. 9 n.40 (explaining reasons for not crediting Rapacioli's testimony, including that he was uncertain, speculated, and then contradicted himself).

Under Standard Dry Wall Products, there is no basis for the Board to overturn the ALJ's credibility resolutions.

In contesting the ALJ's credibility determinations on this issue, MVPT makes blatantly false and misleading allegations about when employees became aware that MVPT recognized Local 707. Contrary to MVPT's allegation, driver Nilda Muniz testified that she found out that she was represented by a union in November or December 2008. Compare MVPT Br. at 13 and Tr. 239-40. Muniz was not even employed by MVPT until October 2008. See Tr. 227. Similarly, Stephen Rebracca, one of MVPT's first

drivers and who the ALJ deemed the trial's most credible witness, see ALJD p. 9 n.41, testified that he did not know that Local 707 had been recognized until November 2008. Compare MVPT Br. at 13 and Tr. 206, 215, 224-25.

Local 707 also makes incorrect allegations. Contrary to Local 707's allegations, Russell and driver-trainee Baumwoll testified that they did not see the postings in issue. Compare Local 707 Br. at 4 n.4 and Tr. 89-90, 137, 152.

Even assuming that MVPT or Local 707 posted notices about the recognition in September 2008 in the drivers' room, the ALJ found that such notices would not have been reasonably observable. See ALJD p. 9, l. 14 - p. 10, l. 2, p. 17, l. 25-27. Again, the record evidence amply supports this finding. See ALJD p. 10 n.42.

As set forth above and as the ALJ found, even if employees knew that MVPT recognized Local 707 in September 2008, they would not know that MVPT or Local 707 violated the Act. Moreover, the knowledge of employees on the payroll prior to October 20, 2008 can not be imputed to Charging Party Russell under Dedicated Services.

Last, MVPT and Local 707 cite in support of their position that the Section 10(b) period begins to run when any employees had notice of a violation Texas World Serv. Co. v. NLRB, 928 F.2d 1426 (5th Cir. 1991), and R.J.E. Leasing Corp., 262 NLRB 373

(1982), and MVPT also cites NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147 (10th Cir. 2000). See MVPT Br. at 12; Local 707 Br. at 6. None of those cases involves application of the notice requirement for commencing a limitations period under Section 10(b) and none of those cases holds that there is a single statute of limitations that binds all employees regardless of when they learn of a violation of the Act. In short, none of those cases suggests that the principles set forth in Dedicated Services do not govern here.

For all of these reasons, the ALJ correctly rejected MVPT's and Local 707's Section 10(b) defense.

III. The ALJ correctly drew adverse inferences because MVPT failed to produce subpoenaed payroll records and I-9 forms.

MVPT wrongly excepts to the ALJ's ruling that it is appropriate to draw adverse inferences against MVPT regarding information contained in the "payroll records" that MVPT produced. See MVPT Exceptions 1-3.

While MVPT states that it produced payroll records in response to General Counsel's subpoena, see MVPT Br. at 9-10, MVPT did not produce actual payroll records. The only "payroll records" in evidence are General Counsel's Exhibits 30 and 31. However, these are not actual payroll records maintained in the ordinary course of business. These documents are summaries of information MVPT maintains in its corporate office that MVPT

formatted unilaterally for production in response to subpoenas in this case. See ALJD p. 2, l. 33-35 & n.2; Tr. 349-50, 351-52.

MVPT also asserts that it is "undisputed" that it produced other documents with accurate payroll information. See MVPT Br. at 10. However, General Counsel stated that these documents "are no more accurate and may be probably less accurate than what we already have." Tr. at 762. Moreover, when General Counsel asked Rapacioli who would have accurate hire date information, Rapacioli did not identify the records upon which MVPT now would rely, but opined that the most accurate records would be training class sign-in sheets, some of which he stated are missing. See Tr. 451.

General Counsel sought additional information that would permit a more precise understanding of when employees started working, including Form I-9s. See ALJD p. 2, l. 33- 41. However, MVPT refused to produce the I-9s, even after the ALJ denied MVPT's petition to revoke the General Counsel's subpoena insofar as it sought those records. See ALJD p. 2, l. 42 - p. 3, l. 1. Thus, inferences adverse to MVPT's position regarding the dates employees worked are appropriate. See ALJD p. 3, l. 3-10; ALJ Exs. 1-4; Tr. 692-715.

In any case, MVPT does not identify any prejudicial error regarding the content of the "payroll records" resulting from

the ALJ drawing such inferences. Rather, the prejudice MVPT claims is that the ALJ discredited all of Rapacioli's testimony based solely on Rapacioli's disavowal of the information he produced. See MVPT Br. at 9. However, the ALJ only found that Rapacioli's credibility was "necessarily diminished" because of this testimony. See ALJD p. 2 n.2. The ALJ credited portions of Rapacioli's testimony, and when he did not do so it was based upon a reasoned analysis. See supra at 31.

MVPT's mischaracterizations of the record evidence, its responses to subpoenas, and the ALJ's Decision serve only to confirm the appropriateness of the ALJ drawing inferences in favor of the General Counsel as described in the ALJ's Decision. See ALJD p. 3, l. 6-10; Bannon Mills, Inc., 146 NLRB 611 (1964).

CONCLUSION

For the foregoing reasons, MVPT and Local 707 violated the Act as alleged in the Complaint and MVPT's and Local 707's Exceptions are without merit.

Dated: New York, New York
August 11, 2010

Respectfully submitted,

By: Richard Brook

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Jessica Drangel Ochs
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& KLEIN, P.C.
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New York, New York 10018
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Attorneys for Charging Party
Local 1181, Amalgamated
Transit Union, AFL-CIO

ATTACHMENTS

Quinto Rapacioli

From: Cosgrove, Michael [Michael.Cosgrove@nyct.com]
Sent: Wednesday, October 01, 2008 5:29 PM
To: Adem Adem
Cc: Dako, Christine; Quinto Rapacioli
Subject: RE: Today's Service MVP Transportation in SI

We can use the service and the feedback is good, but its only one day. Let's move easy on this. You want to maintain a problem free on-street service delivery.

To begin with, let me have a full a picture of your driver situation.

How many approved operators do we have in the system right now? Specify if this number includes the October 6th class or not. If doesn't include the October 6th class, how many graduates do you expect? Did S&C review and say these operators were acceptable?

Also, have we gotten anywhere on where we are going to maintain and DOT the vehicles?

If want, we can go through on the phone tomorrow

From: Adem Adem [mailto:aadem@mvtransit.com]
Sent: Wednesday, October 01, 2008 4:45 PM
To: Cosgrove, Michael
Cc: Dako, Christine; Quinto Rapacioli
Subject: Re: Today's Service MVP Transportation in SI

Hello, Mr. Cosgrove

I believe overall everything went all right today and please let me know the feedback you received from command center to improve our service. let me know when to expect the second batch of vehicles to schedule DOT and get the vehicles ready for the next two class coming out Monday October 6 and Monday October 13.

Thanks again for your continues support on this project

Adem
347-739-0205

EXHIBIT NO. CX 26 RECEIVED ✓ REJECTED _____

CASE NO. _____ CASE NAME MV TRANSPORTATION

NO. OF PAGES 1 DATE 9/26/09 REPORTER Mona

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FOR IMMEDIATE RELEASE:

MV Public Transportation, Inc. wins $422 million contract in NY

(Staten Island, NY --- October 6, 2008) MV Public Transportation, Inc. – chosen by the New York Metropolitan Transit Authority to manage and operate paratransit services for Staten Island – has successfully begun operation of the Access-A-Ride paratransit services in the borough.

In less than 30 days from contract signing MV placed a strong team in position, and transitioned into the service. Under the terms of the 10-year contract, MV began providing service on October 1 with 11 vehicles on eight routes.

The company has operated paratransit services with the MTA since 2001, and currently has a local office in Brooklyn. The initial contract award includes a doubling of the vehicles used to provide service – from 150 to 300.

"We are thrilled about this new opportunity for our company in New York," said Alex Lodde, MV's Founder and Chief Executive Officer. "We will offer a fresh new approach to the services that are currently being offered and look forward to meeting with riders, advocates and community leaders in the coming months in an effort for all stakeholders to become familiar with the others."

In Brooklyn, MV manages 310 routes daily with 251 vehicles, and employs more than 450 transit professionals – this contract will surge to 300 vehicles in the months ahead. The company has been recognized by the MTA for improving overall service and for stepping up to the plate by continuing to provide service during challenging situations.

Based in Fairfield, California, MV is the largest private provider of paratransit services and the largest privately-owned transportation contracting firm in the United States. The company employs more than 12,000 dedicated transit professionals and operates more than 190 paratransit, fixed-route, shuttle and Medicaid contracts in 24 states, the District of Columbia, and Canada.

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Contact:
Nikki Frenney, VP of Marketing and Government Relations
Phone and fax: 707-863-8739
Email: nfrenney@mvtransit.com
Website: www.mvtransit.com

GC23

Attachment # 30

Vehicle Start Up / Expansion Schedule
07H9751N - MV Public Transportation, Inc.

Start Up

Initial Startup:

Following the date of Notice of Award / Notice to Proceed (NOA/NTP), the Contractor shall field the specified Revenue Service within the applicable periods of time set forth below:

Fifteen (15) Vehicles within forty-five (45) calendar days from NOA/NTP;

Twenty (20) additional Vehicles per month for the first three (3) months after forty-five (45) calendar days from NOA/NTP;

Ten (10) additional Vehicles each month thereafter until 150 Vehicles is reached.

Expansion Schedule

Expansion:

After completion of initial 150 vehicles, ten (10) additional Vehicles per month, until 300 Vehicles is reached.

2 Broadway
New York, NY 10004

Howard H. Roberts, Jr.
President

New York City Transit

September 22, 2008

Mr. Quinto Rapacholli, Project Manager
MV Public.
1957 Richmond Terrace
Staten Island, NY

Re: Authorization to Proceed with Richmond Terrace Facility

Dear Mr. Rapacholli:

This is in response to Mr. Adem's letter dated September 15, 2008, regarding MVP's alternate proposed facility, located at 1957 Richmond Terrace, Staten Island.

We acknowledge your responses to the questions raised and hereby approve the 1957 Richmond Terrace site for MV Public Transportation Inc. This approval is contingent on the following items offered by MVP during the September 12, 2008 site tour. These contingencies are in addition to those items described in Mr. Adem's September 10th and 15th, 2008 correspondence, copies attached.

- MV indicated that it will have beneficial use of the Richmond Terrace Facility within 6 months, or sooner, from the date of this letter.
- While the site is being completed, MVP will maintain the ramp up commitment in the BAFO and operate temporarily from 40 LaSalle Street, SI., NY, 10303.
- MVP is required to take all steps necessary to be able to operate out of the temporary site such as but not limited to providing fencing, grading and having the parking area graveled, supplying high speed business internet access and trailers.
- It was indicated in MV's September 15, letter that it is anticipated the lease cost of 1957 Richmond Terrace will exceed the costs in your BAFO and award. Please be advised that any mobilization and monthly payments will be limited to the amounts specified in your BAFO and contract award.
- You are required to submit the actual lease document when it is finalized.

Sincerely,

Michael J. Cosgrove
Contract Management Officer

EXHIBIT NO. GX RECEIVED J REJECTED
CASE NO. CASE NAME MV TRANSPORTATION
NO. OF PAGES 1 DATE 2/10/09 REPORTER

cc: T. Charles
A. Martelli
T. Rooney
J. Hommel
C. Dako

EXHIBIT
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27

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Answering Brief to Respondents' Exceptions, Cross-Exceptions, and Brief in Support of Cross-Exceptions of Charging Party Local 1181-1061, Amalgamated Transit Union, AFL-CIO to be served by e-mail upon:

Nancy Lipin
Counsel for the General Counsel
nancy.lipin@nlrb.gov

H. Tor Christensen
Counsel for MVPT
TOChristensen@littler.com

George Kirschenbaum
Counsel for Local 707, IBT
GKirschenbaum@carykanelaw.com

John Russell
Charging Party
kmf1313@gmail.com

Eric Baumwoll
Charging Party
easyenyc@msn.com

this 11th day of August, 2010.

Jessica Drangel Ochs